FOR ARGUMENT

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., et al., *Petitioners*

v.

UNITED STATES OF AMERICA for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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F. D. Rich Co., Inc. v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974) 3, 4, 6

STATUTES:

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COUNTERSTATEMENT OF THE CASE

Respondents have accepted Petitioners' statement of the case. However, since respondents seek to place undue emphasis on what they characterize as "findings" of the Court of Appeals, petitioners believe it necessary to point out to the Court that the so-called "finding" of the District Court that the relationship between Bateson and Colquitt was "substantial and

important" was only an unsupported conclusion of the District Court contained in the order dated July 3, 1974, denying petitioners' motion to dismiss (App. 20). Other than the complaint, petitioners' motion to dismiss with accompanying points and authorities in support thereof, respondent's memorandum in response to the motion to dismiss, and argument of counsel for the parties, there was no basis upon which the District Court could make any factual findings. There was no trial or hearing and no evidence before the District Court upon which to base any finding with regard to the relationship between Bateson and Colquitt and even assuming that the allegations of the complaint were deemed to be admitted for the purpose of petitioners' motion to dismiss, there are no facts pleaded in the complaint which would support a finding that the relationship between Bateson and Colquitt was "substantial and important."[1]

The mere fact that Colquitt was installing a sprinkler system in the addition to the hospital does not of itself form a basis for any conclusion that Colquitt's relationship to Bateson was "substantial and important." Nor does the mere fact that the sprinkler work was specifically required by the prime contract support such a finding for every item of material and every hour of labor required to complete the project was, in a sense, required by Bateson's prime contract.

Petitioners would also like to point out to the Court that no significance should be placed on the fact that

[1] The work to be performed by Colquitt under its sub-subcontract with Pierce was, in fact, only a very minor item of work in consideration of the fact that Bateson's prime contract was for $39,015,272.20.

Pierce hired Colquitt's employees to finish the job when Colquitt, because of its financial difficulties, could no longer perform. Pierce was simply doing what it was required to do to insure that its subcontract with Bateson was fully performed. Whether the sprinkler work was a significant or insignificant part of its subcontract was unimportant because Pierce was contractually bound to complete this work regardless of whether it was a minor or a major portion of Pierce's subcontract with Bateson.

With respect to the fact that copies of Colquitt's payrolls were submitted to Bateson, petitioners wish to point out that such records in no way reflected the fact that the fringe benefit contributions were not being paid by Colquitt to respondents.

ARGUMENT

I. Respondent Misconstrues the Decisions of This Court

Respondents seek to polarize the positions of the parties by characterizing petitioners position as an "overly technical, mechanistic analysis" while urging the Court to adopt a functional approach to find that Colquitt was a "subcontractor". Petitioners' position is not, however, that a technical, mechanistic approach should be adopted, but simply that a correct application of the functional approach adopted by this Court in *F. D. Rich Co., Inc.* v. *United States ex. rel. Industrial Lumber Co.*, 417 U.S. 116 (1974) and *Clifford F. MacEvoy* v. *United States ex rel. Calvin Tompkins Co.*, 322 U.S. 102 (1944) would deny to Colquitt the status of a subcontractor. Respondents would have this Court ignore the factual basis upon which the Court applied the "substantial relationship" test in *Rich* to find that

Cerpac was a "subcontractor." In determining that Cerpac had a substantial and important relationship with Rich, the prime contractor, the Court found that not only did Cerpac have a contract with Rich to supply exterior plywood, but it also had a separate contract with Rich to select, modify, detail, and install all custom millwork. Not only did the Court find that Cerpac, in effect, had taken over a substantial part of the prime contract, but the management and financial structures of Cerpac and Rich were closely interrelated and their relationship on the project in issue was the same as on many other similar Government projects during the same period. The Court further commented that the Court of Appeals had observed, that Cerpac was "in a special, integral, almost symbiotic relationship [with] Rich." 47 U.S. at 124.

The relationship of Colquitt to Bateson, on the other hand, was in no way the type of relationship found to be "substantial and important" in *Rich*.

Respondents would have this Court summarily disregard all of the Circuit Court decisions cited in petitioners' brief pages 14-17 on the basis that they antedate *Rich*. However, this Court's opinion in *Rich* makes it abundantly clear that a functional test was adopted in *MacEvoy*. *Rich* did not establish a new test, but the Court merely applied the functional definition previously adopted in MacEvoy, to the facts in *Rich* to find that Cerpac was a "subcontractor". Likewise, the decisions of the various Circuit Courts relied upon also applied the definition of "subcontractor" set forth in *MacEvoy*. Those decisions cannot simply be brushed aside as no longer representing the law on the subject.

II. The Result Reached by the Court of Appeals Is Incorrect Even as a Matter of First Impression

Respondents argue that the adoption of the position urged by petitioners would lead to arbitrary and unreasonable distinctions in coverage under the Act because some employees laboring on public projects would be held to be protected by the Act while others would not be. Upon close analysis it is in respondents' position, not petitioners', which would result in unreasonable distinction in coverage for only employees of "subcontractors" whose work is substantial and important would be covered. What Respondents actually wish this Court to hold is that all laborers working on Government construction projects are protected under the Act. Yet respondents would apparently treat materialmen in a different vein. The proviso of 40 U.S.C. § 270b(a) makes no distinction between those supplying labor and those furnishing material to a "subcontractor". Thus, respondents' suggestion that Colquitt's employees are entitled to a special status because they were performing work on the job site is not well taken.

Respondent's argument that the adoption of petitioners' position would promote disruption and delay in the completion of Government construction contracts since employees would have no choice but to quit their employment when their wages or fringe benefits are not paid only serves to demonstrate respondents' misconception of the practical applications of the Miller Act. If employees are not paid their wages when due, they will quit their employment regardless of the fact that they might have a right to make claim on the Miller Act bond. As far as the non-payment of fringe benefits is concerned, it is unlikely that the employees would even be aware of the fact that such contributions

had not been paid until after their work had been completed.

While respondents recognize that the coverage of the Miller Act is limited by the proviso of § 2(a) of the Act, they interpret the limitations to apply to those persons having a more remote or ancillary connection to the project than those persons actually "supplying labor and materials in the prosecution of the work." Respondents' interpretation is directly contrary to the holding of this Court in *MacEvoy* where a mere supplier of materials to a materialman was held to be too remote and the holding of this Court in *Rich* that a supplier of materials to a subcontractor was covered by the Miller Act bond. A protected person under respondents' theory would be required to actually supply both labor and materials in the prosecution of the work. This approach would exclude a mere materialman altogether which is obviously not the intent of the Act.

Respondent's attempt to confer a special status upon Colquitt's employees simply because they performed labor over a period of time on the project and because a portion of their earnings in the form of fringe benefit contributions was not paid. Obviously, respondents have taken this approach in order to create the false impression that petitioners are attempting to deny recovery to the employers solely on a technicality. This clearly is not the case. Petitioners say simply that Colquitt cannot qualify as a "subcontractor" under the definition of that term set forth in *Rich* because to be a "subcontractor" something more must exist in the relationship between the prime and the "subcontractor" than was the case here, where no contractual relationship whatsoever existed between Colquitt and Bateson.

Furthermore, Colquitt's employees are not the claimants in this case, but the claimants are Union Trustees who not only allowed the contributions in issue to go unpaid for a lengthy period of time after they became due and were not paid, but who also waived the requirement under the collective bargaining agreement between the Union and Colquitt that Colquitt furnish a bond to secure payment of the contributions in issue (App. 13, 25, 49). Furthermore, although respondents technically complied with the notice requirement of the Miller Act, it cannot be said that the Union Trustees did all they should have done to see that Colquitt's obligations were paid. Although not required by the Miller Act, if notice had been given to Pierce that Colquitt was not meeting its obligations under the collective bargaining agreement, Pierce would have been in a position to take steps to insure that the contributions were paid from funds being paid by Pierce to Colquitt (App. 37). If recovery of the contributions in issue is to be denied, it is apparent that some, if not all, of the blame may be placed on respondents. Respondents suggest that the only action which would have been available if the pension and welfare contributions were not paid would have been a strike called at the request of Local 609 if relief was not available under the Miller Act. This clearly is not so. If respondents had not waived the bond requirement and had they acted promptly when Colquitt ceased making the contributions, this action would never have occurred because the contributions required of Colquitt would have long since been paid out of monies becoming due from Pierce to Colquitt.

CONCLUSION

Respondents' arguments go far beyond the confines of the Miller Act. To extend coverage to respondents would eliminate the limitations of coverage under the Act which were previously recognized by this Court in *MacEvoy* and *Rich*. If coverage is to be extended to cover persons such as respondents in this case, this is a matter for the Congress, not for the judiciary, for Congress plainly limited coverage under the Act to those persons furnishing labor or materials to the prime contractor or to a subcontractor of the prime contractor—"A sub-subcontractor may avail himself of the protection of the bond," however, those in "more remote relationships" are not within the purview of the bond (H. Rep. No. 1203, 74th Cong., 1st Sess. p. 3). Respondents arguments should be rejected and the decision of the Court of Appeals reversed.

Respectfully submitted,

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